No. 10, Original

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1956

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA,

Defendants,

UNITED STATES OF AMERICA,

Intervener

MOTION FOR LEAVE TO FILE REPRESENTATION OF INTEREST AND REPRESENTATION OF INTEREST BY THE COLORADO RIVER INDIAN TRIBES OF THE COLORADO RIVER INDIAN RESERVATION, ARIZONA AND CALIFORNIA; GILA RIVER PIMA-MARICOPA INDIAN COMMUNITY, ARIZONA; HUALAPAI INDIAN TRIBE OF THE HUALAPAI RESERVATION, ARIZONA; NAVAJO TRIBE OF INDIANS OF THE NAVAJO RESERVATION, ARIZONA AND NEW MEXICO; SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY OF THE SALT RIVER RESERVATION, ARIZONA; THE SAN CARLOS APACHE TRIBE, ARIZONA AND THE FORT MCDOWELL MOHAVE-APACHE INDIAN COMMUNITY OF THE FORT MCDOWELL RESERVATION, ARIZONA.

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General Counsel for Association on American Indian Affairs

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The petitioners herein move for leave to file the accompanying representation of interest. In support of this motion petitioners show as follows:

1. The petitioners are American Indian Tribes with a total population of about 85,000, each with a tribal organization recognized by the Secretary of the Interior as authorized to represent its Tribe.

2. Each of the Tribes resides within the lower Colorado River Basin and is the beneficial owner of lands and the

right to the use of water within the basin. The right to their respective shares of these waters is vital to the continued existence of the members of the Tribes and to the future development of a stable economy on their reservations.

3. This case presents for adjudication the relative rights of the parties-litigant and of petitioners and other Indian wards of the United States to divert waters from the lower Colorado River Basin.

4. Justice and fair play require that a determination be made as to whether the Attorney General of the United States is representing conflicting interests in this case, and if so, whether the interests of petitioners are adequately and properly represented.

5. There is doubt as to whether petitioners may file as amicus curiae since they are real parties in interest as beneficial owners of an undetermined portion of the water rights at stake.

6. There is doubt as to whether petitioners may intervene as separate parties since their interests are committed to adjudication by the intervention of the United States and in any event petitioners are without available funds or means for preparing and participating in this case.

7. Under Rule 9 of this Court, the Federal Rules of Civil Procedure are applicable as a guide in original actions. The procedure here followed by petitioners would be the

procedure utilized to apprise a district court of a comparable situation.

Respectfully submitted,

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Attorney for the Fort McDowell Mohave-Apache Indian Community of the Fort McDowell Reservation, Arizona.

DRAFT June 20, 1956

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OCTOBER TERM, 1956

STATE OF ARIZONA,

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1. The petitioners are American Indian Tribes with a total population of about 85,000, each with a tribal organization recognized by the Secretary of the Interior as authorized to represent its Tribe.

2. Each of the Tribes resides within the lower Colorado River Basin and is the beneficial owner of lands and the right to the use of water within the basin. The right to their respective shares of these waters is vital to the continued existence of the members of the Tribes and to the future development of a stable economy on their reservations.

3. This case presents for adjudication the relative rights

of the parties-litigant and of petitioners and other Indian wards of the United States to divert waters from the lower Colorado River Basin. The Indian rights in the water stem from treaties with Indian tribes, executive action, the creation of Indian reservations and various Acts of Congress. *Winters* v. *United States,* 207 U. S. 564, 576-577; *United States v. Walker River Irr. Dist.,* 104 F. 2d 334, 336 (C.A. 9, 1939); *Cohen, Felix S., Handbook of Federal Indian Law,* pp. 316-319 (1945).

4. The United States has intervened in this case and has placed the rights of petitioners in issue. As a result petitioners are precluded from asserting their rights in their own names and on their own behalf. They have no control over the course of the suit, no voice in its direction and no right or opportunity to participate in the formation or trial of the issues. The United States controls their interests in issue. It can waive or compromise their rights, fail to prosecute them in full or in part, allow them to go by default, or fail to assert essential contentions. *Heckman* v. *United States,* 224 U. S. 413, 445-446; *Pueblo of Picuris in State of New Mexico* v. *Abeyta,* 50 F. 2d 12, 13-14 (C.A. 10, 1931).

5. The petitioners present to the Court the question of whether their interests can be properly or adequately represented by the Attorney General of the United States if the interests of the United States, as a sovereign proprietor and contractor are in direct conflict with the interests of the petitioners. Thus the United States has numerous contractual obligations to deliver Colorado River water to various water and irrigation districts and projects, and to the States of Nevada and Arizona. It has contracted to sell electricity (Petition of Intervention, Pars. XII-XXIV). In addition it has an international treaty obligation to de-

liver annually 1,500,000 acre feet of Colorado River water to Mexico (*Ibid.*, Par. XIII).

The proprietary rights and contract commitments of the United States on the one hand and the beneficial rights of the Indians on the other are in competition with each other for the same water. Since there is not sufficient water to meet the demands of all parties, priorities and allocations will be adjudicated. The Attorney General has undertaken to represent both antagonistic interests of the United States and these petitioners, competitors for the same water, and his obligations force him to sit on both sides of the counsel table at the same time.

6. The dual and conflicting nature of the Attorney General's position in this case is emphasized by his obligation to defend the United States before the Indian Claims Commission and the Court of Claims in suits brought by Indian tribes seeking compensation for loss of water rights. The law established in this case may provide a clear basis for recovery or a complete defense in such claims cases of Indian tribes. Proper advocacy in this case would compel the Attorney General to vigorously prosecute the full rights of petitioners. But if he does so, the Attorney General may be providing the basis for recovery in Indian claims cases in which he is obliged to defend the United States. The conflict seems evident.

7. Petitioners' concern motivating this representation has not been lessened by the proceedings and actions in this case. The following is illustrative:

(a) On December 31, 1952 the United States moved this Court for leave to intervene and in support of its motion advanced the interests of petitioners as a major ground for intervention. The United States referred to the Colorado River Compact, a document basic to the rights of the par-

ties and advised this Court as follows (Motion for leave to intervene, Par. XII):

> * * * Thus there is excluded from the operation of the compact the rights of the United States to divert or to have diverted water from the Colorado River and its tributaries on behalf of the Indians. There is annually diverted for or by the Indians from the Colorado River and its tributaries in the Lower Basin in excess of 750,000 acre-feet and there are asserted, in the ultimate, claims to a greater amount.

In its brief in support of the motion for leave to intervene the United States stated (p. 32) "* * * large claims are asserted on behalf of the Indians whose rights are excluded from the operation of the Colorado River Compact; * * *".

(b) On November 2, 1953 pursuant to the Court's order of January 19, 1953, the United States filed its petition of intervention with the Clerk of this Court. The petition in unmistakable terms asserted the "prior and superior" rights of the Indians. It declared (Par. XXVII, p. 23):

> The United States of America asserts that the rights to the use of water claimed on behalf of the Indians and Indian Tribes as set forth in this Petition are prior and superior to the rights to the use of water claimed by the parties to this cause in the Colorado River and its tributaries in the Lower Basin of that stream.

Four days later, apparently following heated protests by parties-litigant opposing the Attorney General's assertion of the Indians' claims, the Attorney General, without order of this Court and by means unknown to us, physically withdrew the Government's petition of intervention from the Clerk's office. On December 8, 1953, without order of

this Court authorizing amendment, the Attorney General substituted a revised petition of intervention as if it were the initial filing. This extraordinary procedural lapse supplied the means for omitting the critical language quoted above pleading the "prior and superior" rights of the Indians. It permitted the United States to make a radical shift in position without the embarrassment of setting forth the reasons for the change as part of an application for leave to amend. A copy of an article written by Luther A. Huston and published in the *New York Times* of November 16, 1953, describing this unusual procedure is printed in the Appendix, *infra*.

(c) At the pre-trial conference before the Special Master on April 10-13, 1956, almost two and one-half years after the Government's petition of intervention was filed, the United States declared that it still was not ready to define its position on Indian claims either from the standpoint of law or facts. (Transcript, pre-trial proceedings, April 10, 1956, pp. 18, 23-26, 34-35). The Government's attitude was akin to that of a passive bystander, with the clear inference that it desired an inactive role in this case. Thus the Assistant Attorney General in charge urged (*Ibid*, p. 39):

> The United States would like to be last, and we will only ask the questions we feel the States have not covered, if that will be permitted.

It seems to petitioners that such an attitude cannot be reconciled with an intent to present and protect the Indians' full rights. An advocate for the Indians would have no difficulty in unequivocally asserting the prior and superior rights justified by law, set out in the petition of intervention initially filed with this Court and withdrawn and

amended without permission. (See paragraph No. 7a, *supra.*)

(e) The transcript of the pre-trial proceedings reveals a complete failure on the part of the United States to state affirmatively any intention to present and advocate the petitioners' full rights. The Master's efforts to ascertain the Government's position were met with avoidance and pleas of lack of understanding (e.g. *passim*, Tr. 173-204). The failure of the Attorney General to assert petitioners' full rights raises serious doubt as to whether those rights will be effectively prosecuted by the Attorney General.

8. Petitioners probably have no standing separately to sue and in any event are without available funds to prepare a project case of this magnitude. The United States has committed petitioners' rights to adjudication but all decisions concerning the prosecution or abandonment of their rights are made by the Attorney General without reference to or consultation with petitioners. The ultimate responsibility for rendering a just and correct decree rests with this Court. Justice and fair dealing require that petitioners' rights should not be subordinated to conflicting interests through lack of independent advocacy.

Wherefore, petitioners pray as follows:

1. That cognizance be taken of this representation in view of the helpless position in which these petitioners find themselves;

2. That the Attorney General be called upon to explain his unauthorized amendment of the petition of intervention;

3. That the Special Master be instructed as follows:

a. To determine whether a conflict exists between the Indian interests and the interests of the United States apart from those of the Indians;

b. To determine whether the Indian interests are, or can be adequately represented by the Attorney General of the United States; and

c. To recommend whether the interests of justice and fair dealing require separate and independent counsel for the Indians.

Respectfully submitted,

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WEST BESET AGAIN BY INDIAN TROUBLE

Gets Government to Withdraw Colorado River Brief Putting Tribes' Water Rights First

By LUTHER A. HUSTON

Special to THE NEW YORK TIMES.

WASHINGTON, Nov. 15—Indian trouble has developed again in the West and this time it was not the Indians but the Great White Father who started it.

Pow-wows are under way in some of Washington's most impressive wigwams in an effort to settle it and the pipe of peace eventually may be smoked in the Supreme Court.

It is a complicated situation that involves the fight between Arizona and California over the use of the waters of the Colorado River, a controversy that has been raging for more than three decades. The Department of Justice brought the Indians into it.

Despite a disinclination on the part of the Justice Department to talk about it, officials revealed today that pressures from Governors of some Western states induced the department to withdraw a brief it had filed in the Supreme Court, a step rarely taken, and agree to re-examine an issue it had put forward as a major ground for intervening in a suit now pending in the high court.

On Nov. 2 the Justice Department filed a brief with the clerk of the Supreme Court as an intervenor in a suit brought by the State of Arizona against the State of California and other defendants. Quietly, late in the afternoon of Friday, Nov. 6, the brief was withdrawn.

At that time, it is understood, it had not been distributed to any of the Supreme Court Justices.

States' Rights Held Subordinate

The controversial part of the brief asserted that the rights of the Indians and Indian tribes in the Colorado River basin to the use of the waters of the river and its tributaries "are prior and su- Department was upheld by the courts. He asked his fellow Governors to join in a protest to Washington.

As a result Jean Breitenstein, a Denver lawyer who represents Arizona and Colorado in litigation over water problems, was sent to Washington. Mr. Breitenstein conferred with J. Lee Rankin, Assistant Attorney General in charge of the executive adjudications division, and other high officials of the department. On the basis of the protests of the Western Governors as conveyed by Mr. Breitenstein, the brief was withdrawn.

Commitment Is Denied

Mr. Rankin has told attorneys representing Arizona and California that the Justice Department was under no commitment to amend the brief. He is said to have agreed, however, to re-examine the question with an eye to a possible stipulation that would clarify the extent of Indian rights as against those of the states involved.

A Justice Department spokesman said that a new brief would be filed. Conferences at the legal level were going on, he said. Whether or not there would be later conferences between Herbert Brownell Jr., the Attorney General, and some of the Governors who joined in the protest had not been determined.

Northcutt Ely, an Assistant Attorney General of California, who maintains offices here and handles the interests of that state in the Colorado River water controversy, said that what the Federal Government was doing was asserting a first mortgage on behalf of the Indians on water that already had been apportioned between the states under the Colorado River Compact to which Congress had given approval.

If the position taken by the Government should be maintained, and sustained by court decrees, Mr. Ely said, the interstate compact under which California had spent more than half a billion dollars to develop water projects would "be busted."

Arizona filed its suit on Aug. 28 against California and seven municipal or public corporations that have participated, under the laws of California, in the development of reclamation, electric power and other projects undertaken under the Colorado River Compact. In use of the Colorado River's water is a long one. The river rises in Colorado, near the crest of the Continental Divide, 9,000 feet above sea level. It flows 1,293 miles, draining, with its tributaries, parts of the states of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming.

The river traverses a semi-arid region containing about 240,000 square miles. It finds the sea in the Gulf of California, seventy-five miles below the border between the United States and Mexico.

Canyon Separates Lands

The lands to which water of the river may be beneficially applied are separated by nearly 1,000 miles of canyon, and the states above this canyon are in what is known as the upper basin; those below it in the lower basin. The dividing line is at Lee Ferry, twenty-three miles below the Utah-Arizona border.

More than fifty years ago it was discovered that the claims of rights to use water in the lower basin exceeded the amount of water available. So there might be an equitable distribution of the available water, the Colorado River Compact was signed in November, 1922, by California, Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming.

The compact became effective June 25, 1929, by act of Congress and by Presidential proclamation, although Arizona had not ratified it at the time. Although water was allotted to Arizona under the compact, the state did not ratify the agreement until 1944.

The compact appointed in perpetuity to the states of the upper basin 7,500,000 acre feet of water and to the states of the lower basin an equal amount. It was provided, however, that the lower basin had the right to increase its beneficial consumptive use of water by 1,000,000 acre feet annually.

Right t oWater Limited

When Congress passed the Boulder Canyon Project Act, it required California to adopt a state law limiting its right to water delivery from the Colorado to the number of acre feet specified in the compact, Arizona contends that this means the 4,400,000 acre feet that constituted the basic allottment made under the lower basin compact and does not apply to the 1,000,000 additional acre feet the lower basin received the right to use annually.

Arizona, which is the only other state in the lower basin, declares that all of the 1,000,000 acre feet should be given to her.

The Indians come into the picture under a clause in the Colorado Compact that says:

"Nothing in this compact shall be constituted as affecting the obligations of the United States of America to Indian tribes."

The various Indian reservations and projects in Arizona and California are at present using, according to the Justice Department brief, 747,170 acre feet of water from the Colorado River system. The Government asserted that this use ultimately will increase to 1,747,000 acre feet.

This presents a two-fold problem, according to Mr. Ely. The first is whether the Indians have a priority to take whatever water they want whether they fell like it. The second is whether the water claimed by the Indians is to come out of the amounts allotted to the lower basin or whether the Indians can just take their share in as they want it and let Arizona and California divide what is left.

California Position Outlined

The position taken by the Justice Department in its brief is that the Indians have priority to take what water they want when they want it, regardless of the share of the states.

California contends that the Indians must share, the same as white citizens, in the total allotment of the lower basin. Under this interpretation, Arizona, which has more Indians and more reservations than California, would have to give up more water to Indian uses than would its sister state.

California, according to Mr. Ely, does not join in the protest against the claim asserted by the Department of Justice on behalf of the Indians to "prior and superior" water delivery rights. Mr. Ely said that his state would like to have the matter litigated before the Supreme Court. He contends that the question cannot be settled by stipulation, as Arizona has proposed in the conferences now going on.

The United States should be a party in interest to the Arizona-California litigation, Mr. Ely asserts, because of its responsibility to the Indians, its vast expenditures in constructing Boulder Dam, which impounds the waters allotted to the states, and other works necessary to the operation of the project.

The Supreme Court was correct, Mr. Ely asserted, in allowing the Justice Department to intervene in the Arizona-California suit, but the Justice Department was wrong in asserting that the rights of the Indians were "prior and superior" to the water-delivery rights of other citizens under the Colorado compact.

Britain Has 82,000 Pubs

LONDON, Nov. 15 (AP)—The Government's "annual abstract of statistics," published today, says this country has 82,000 pubs. Last year these pubs sold about nine gallons of beer per head to the 50,000,000 population.

Tribes' Water Rights First

By LUTHER A. HUSTON

Special to THE NEW YORK TIMES.

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It is a complicated situation that involves the fight between Arizona and California over the use of the waters of the Colorado River, a controversy that has been raging for more than three decades. The Department of Justice brought the Indians into it.

Despite a disinclination on the part of the Justice Department to talk about it, officials revealed today that pressures from Governors of some Western states induced the department to withdraw a brief it had filed in the Supreme Court, a step rarely taken, and agree to reexamine an issue it had put forward as a major ground for intervening in a suit now pending in the high court.

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At that time, it is understood, it had not been distributed to any of the Supreme Court Justices.

States' Rights Held Subordinate

The controversial part of the brief asserted that the rights of the Indians and Indian tribes in the Colorado River basin to the use of the waters of the river and its tributaries "are prior and superior" to the rights of Arizona, California or the other states in the basin. This was a position never before taken, attorneys said, in all the long history of the development of the prevailing system of distribution of the waters of the river among the states.

Eleven Governors of Western states were in conference at Albuquerque, N. M., when news of the Justice Department's assertion of the paramount claims of the Indians reached that region.

Gov. Howard Pyle of Arizona, according to officials here, told the Governors that the interests of his state would be vitally affected [illegible] of the executive adjudications division, and other high officials of the department. On the basis of the protests of the Western Governors as conveyed by Mr. Breitenstein, the brief was withdrawn.

Commitment Is Denied

Mr. Rankin has told attorneys representing Arizona and California that the Justice Department was under no commitment to amend the brief. He is said to have agreed, however, to re-examine the question with an eye to a possible stipulation that would clarify the extent of Indian rights as against those of the states involved.

A Justice Department spokesman said that a new brief would be filed. Conferences at the legal level were going on, he said. Whether or not there would be later conferences between Herbert Brownell Jr., the Attorney General, and some of the Governors who joined in the protest had not been determined.

Northcutt Ely, an Assistant Attorney General of California, who maintains offices here and handles the interests of that state in the Colorado River water controversy, said that what the Federal Government was doing was asserting a first mortgage on behalf of the Indians on water that already had been apportioned between the states under the Colorado River Compact to which Congress had given approval.

If the position taken by the Government should be maintained, and sustained by court decrees, Mr. Ely said, the interstate compact under which California had spent more than half a billion dollars to develop water projects would "be busted."

Arizona filed its suit on Aug. 28 against California and seven municipal or public corporations that have participated, under the laws of California, in the development of reclamation, electric power and other projects undertaken under the Colorado River Compact. In substance, Arizona asks the Supreme Court to declare it entitled to 3,280,000 acre feet of water and limit California to 4,400,000 acre feet. This would add 500,000 acre feet to what Arizona gets now and take away 500,000 acre feet from California.

An acre foot is sufficient water to fill a prism the size of an acre of land to a depth of one foot.

Arizona also raised the question of the validity of California's water delivery contracts under laws passed by the California Legislature.

The story of the fight over the river traverses a semi-arid region containing about 240,000 square miles. It finds the sea in the Gulf of California, seventy-five miles below the border between the United States and Mexico.

Canyon Separates Lands

The lands to which water of the river may be beneficially applied are separated by nearly 1,000 miles of canyon, and the states above this canyon are in what is known as the upper basin; those below it in the lower basin. The dividing line is at Lee Ferry, twenty-three miles below the Utah-Arizona border.

More than fifty years ago it was discovered that the claims of rights to use water in the lower basin exceeded the amount of water available. So there might be an equitable distribution of the available water, the Colorado River Compact was signed in November, 1922, by California, Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming.

The compact became effective June 25, 1929, by act of Congress [illegible] basin an equal amount. It was provided, however, that the lower basin had the right to increase its beneficial consumptive use of water by 1,000,000 acre feet annually.

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California contends that the Indians must share, the same as white citizens, in the total allotment of the lower basin. Under this interpretation, Arizona, which has more Indians and more reservations than California, would have to give up more water to Indian uses than would its sister state.

California, according to Mr. Ely, [illegible] going on.

The United States should be a party in interest to the Arizona-California litigation, Mr. Ely asserts, because of its responsibility to the Indians, its vast expenditures in constructing Boulder Dam, which impounds the waters allotted to the states, and other works necessary to the operation of the project.

The Supreme Court was correct, Mr. Ely asserted, in allowing the Justice Department to intervene in the Arizona-California suit, but the Justice Department was wrong in asserting that the rights of the Indians were "prior and superior" to the water-delivery rights of other citizens under the Colorado compact.

Britain Has 82,000 Pubs

LONDON, Nov. 15 (AP)—The Government's "annual abstract of statistics," published today, says this country has 82,000 pubs. Last year these pubs sold about nine gallons of beer per head to the 50,000,000 population.